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ABSTRACT

Defamation of character, as applied to libel and slander legal decisions, is the subject of this paper. After briefly describing the basis of liability, the author discusses "libels per quod." He then cites numerous court decisions in commenting on mitigating circumstances in action for libel or slander, including absolute privilege, fair comment, matters of public interest, the effect of being a public figure, good faith, reliance on government information, and lack of malicious intent. In discussing retraction as a defense, the author indicates that retraction does not eliminate liability but may reduce penalties. He cites and discusses several cases relating to defamation by radio, television, and cable television. In an extensive concluding section, the author considers cases and points referred to elsewhere in the paper and adds more case illustrations in describing the parameters of defamation of character in legal decisions in cases of libel and slander. (TJ)

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ADVERTISING AND DEFAMATION OF CHARACTER

by

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Usage of Name or Likeness as Defamation of Character: Introduction

Despite individual claims and public concern for the preservation of private rights to protection of one's character, for many years, the legislatively progressive state of New York had no specific statute to protect against defamation. The New York anti-defamation statute was not passed until the common law protection against libel and slander was practiced widely throughout the United States. Indeed, this was a curious situation for a state characterized by highly visible performers, businessmen, and politicians. Defamation cases, however, were brought before the courts, under the New York Civil Rights Law, SS 50-5[. Within the last decade, the state legislature of the empire state has remedied this oversight with the passage of Sections seventy-five through seventy-eight.of the Civil Rights Law.

For these reasons, our concentration will be placed on consideration of defamation precedents set by mostly non-New York courts, although New York is traditionally considered a leader in the area of individual rights and liberties and their protection.

Basis of Liability

William Prosser explains that "a defamatory communication, usually has been defined as one that tends to hold the plaintiff up to hatred, contempt, or ridicule, or to cause him to be shunned or avoided." The case of Flake v. Greensboro News Co. divides libel into three classes. These subdivisions include publications which are obviously defamatory, statements susceptible to more than one interpretation, one of which is defamatory, and publications which are not obviously defamatory, "but which become so, when considered in connection with innuendo, colloquim, and explanatory circumstances," supra, 59.

Libels per quod

While the first two examples of defamation are evident in Flake, the third requires further development. This issue "concerns cases of libel in which the defamatory meaning, or innuendo, is not apparent on the face of the publication, but must be made out by proof of extrinsic facts; and the question is whether in such a case the libel is actionable without proof of special damages, where the same words would not be so actionable if they were slander", Proseer, 79 Harvard Law Review 1629, 1630-1631 (1966).

Professor Prosser's view is that "libel per quod" should require the pleading of special damages, thus subjecting it to the same proof of damages as is the case in slander actions. However, in Massachusetts, the distinctions between meaning on "face", and meaning in "context", is "irrelevant to the issue of pleading special damages", Sharratt v. Housing Innovations, 310 NE2d 343 (1974). This is the case in most of the states, whereby requirements for proof of damages in libels per quod are the same as they are in libel in general and in slander per se, rather than in slander in general.

In Sharratt, a registered architect and the corporation of which he was the principal stockholder brought a defamation action against the publisher of a promotional brochure, which stated the associate architect rather than the plaintiff had been awarded an architectural contract for a development project. The defendants argued that on their face, the words could not be construed as defamatory. The plaintiff, of course, argued that within their context, the background and circumstances, and the audience's sophistication, they could well be understood as defamatory, and to have defamatory effect. On subsequent appeal, the Supreme Court held that each party was correct. Thus, the issue here is whether the determination of libel is to be made viz. the words alone, or their context in extrinsic facts pleaded. The court concluded that all libel is actionable, per se, ibid.

This decision establishes libel per quod as any libel, separating it from the slander standard. In Lynch v. Lyons, 303 Mass. 116, 118-119, 20 NE2d 953,

955 (1939), it was settled that words spoken orally are not actionable per se, unless they charge a plaintiff with a crime, claim he suffers from some disease, or creates prejudice against him, professionally. In these instances of slander it would not be necessary to demonstrate damages to the plaintiff for recovery, although in other types of slander action it would be necessary for the plaintiff to do so, in order to obtain relief from a jury.

In cases of libel per quod, the damages would be assumed and automatic in Massachusetts, though in most other states the slander standard would be applied to libels per quod and damages would only be assumed or automatic in the instances isolated in Lynch.

Mitigating Circumstances in Action for Libel or Slander

According to Section 78 of the Act, the mitigating circumstances which the defendant may attempt to prove include the sources of his information and the grounds for his belief, regardless of whether he has pleaded or attempted to prove any defense, Goodrow v. Press Co., 233 App Div 41, 251 NYS 364 (1931). Such circumstances include a number of factors which will be described below:

"Absolute Privilege" is a complete defense against defamation. Whether privilege exists at all is a question for the court, and not for the jury, Follendorf v. Brei, 51 Misc 2d 363, 273 NYS2d 128 (1968). Government reports are an example of this privilege, Pauling v. News Syndicate Co., 335 F2d 659 (CANY, 1964) , cert den 379 US 968 (1964).

"Fair Comment" includes any honest statement of actual facts relating to public acts which have been commented upon in a reasonable and justifiable way. It may involve criticism short of attacks upon private character or defamatory statements concerning an official which are considered improper and unjustified, Cheatum v. Wehle, 5 NY2d 585, 186 NYS2d 606, 159 NE2d 166 (1959); Danziger v. Hearst Corp., 304 NY 244, 107 NE2d 62 (1952); Kelly v. Hearst Corp., 2 AD2d 480, 157 NYS2d 498, 3 AD2d 610, 158 NYS2d 781, app den 3 AD2d 963, 163 NYS2d 937 (1956).

Both public officials and private citizens speak on "matters of public interest", whether speaking in performance of their public duties or for general circulation of the press, are protected by freedom of speech guarantees, even if a citizen is defamed in the process, Follendorf v. Brei, supra; Paul v. Davis, Ill., 424 US 693 (1976); Time, Inc. v. Firestone, 424 US 448 (1976).

The vacating of a lower court conviction in the case of Time, Inc. v. Firestone represents a classic case in which the defamatory remarks of a private citizen may be printed with immunity. After Mary Alice Firestone had filed a separate action for divorce, her husband, the scion of a wealthy industrially family, filed a counterclaim for divorce on grounds of extreme cruelty and adultery. The lower court granted the counterclaim, stating that "neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida," and that "the marriage should be dissolved," supra.

On the basis of newspaper and wire service reports and information from a bureau chief and a "stringer", Time Magazine published an item reporting that the divorce was granted "on grounds of extreme cruelty and adultery". After Time had declined to retract, Mary Alice Firestone brought a libel action in state court, which granted a jury verdict for damages against Time, supra.

While the Florida Supreme Court upheld this decision the US Supreme Court overturned it despite the fact that no finding was ever made by the divorce court that Firestone was guilty of adultery as Time had reported. The final court decision was based upon its conclusion that there was no finding of fault on the part of Time in its publication of the defamatory material, a constitutional limitation imposed by Gertz v. Robert Welch, Inc., 418 US 323 (1974).

The case of Paul v. Davis represents a major instance whereby a matter of public interest and official information provided by a government agency is privileged despite its defamatory use. Here a photograph of the respondent bearing his name was included in a flyer of "active shoplifters" after the respondent had been arrested on a shoplifting charge. After that charge had been dismissed, the respondent

brought an action under 42 USC §1983 against the police chiefs who had distributed the flyer to area merchants, alleging that the petitioner's action, under color of law, had deprived him of his constitutional rights, supra.

In the dissenting opinion of Mr. Justice Brennan, with whom Mr. Justice White and Mr. Justice Marshall concur, it was argued that it is a regrettable abdication of the Bill of Rights "when the Court tolerates arbitrary and capricious official conduct branding an individual as a criminal without compliance with constitutional procedures designed to ensure the fair and impartial ascertainment of criminal culpability. Today's decision must surely be a shortlived aberration," supra.

More recent cases have cast further light specifically on what constitutes a public figure for purposes of defamation of character. For example, in the case of Wolston v. Reader's Digest Association., the plaintiff who pleaded guilty in 1958 to criminal contempt charges brought after he failed to appear before a special grand jury investigating activities of Soviet intelligence agents in the US, and who now has brought libel action against the author and publisher of a book on Soviet agents, is a public figure for limited purposes of comment on his connection with Soviet espionage in the 1950's, since espionage is public controversy and the plaintiff, through his refusal to appear before a grand jury, voluntarily injected himself into that controversy. "He cannot now be heard to complain that someone noticed him, unless he can prove actual malice." 429 F Supp 167 (DCDC 1977).

Likewise, a Californian corporation identified in a Federal Trade Commission press release as the target of proposed FTC enforcement proceedings for unfair and deceptive practices is a public figure for purposes of defamation action brought against the newspapers and national wire services that published erroneous reports about the FTC complaint. Thus, it must prove that media defendants published reports with knowledge or reckless disregard of their falsity. Trans World Accounts, Inc. v. Associated Press, 2 Med L Rptr 1334 (ND Cal 1977).

In a similar manner a publishing company was held not libel for unflattering and allegedly libelous characterizations concerning the public figure plaintiff that

appeared in a book on Ernest Hemingway, even though the book's author, contrary to the impression conveyed by the book, apparently had no first-hand knowledge of the plaintiff, since the publication of statements that are not demonstrably unreliable and that cannot be independently verified does not constitute reckless disregard for the truth, Hotchner v. Castillo-Puche, __ F2d__(CA2 1977).

Furthermore, the Speech and Debate Clause barred a scientist's suit against a US Senator and his administrative assistant for damages suffered as a result of investigation into the Federal funding of the scientist's research. In a speech on the Senate floor the Senator bestowed a "golden fleece" award on research for wasting tax dollars, and he issued a press release reciting the substance of the Senate speech, Hutchinson v. Proxmire, USDC, W Wisc 1977).

Newspapers cannot be held liable, in defamation action brought against them by public figure scientists, for an article that fairly and accurately reported on charges made in an environmental group's magazine that scientists were " paid to lie", since accurate reporting by the press of newsworthy accusations is privileged under the First Amendment's right of "neutral reporting", Edwards v. National Audubon Society, ___F2d___(CA 1977).

In a case where a prosecutor, who sent an allegedly defamatory letter to the state legislature protesting proposed reimbursment of inmate for wrongful conviction, the court found that he acted within the scope of his official duties and that the prosecutor's "good faith" is a defense to state law libel action. The cause was remanded to the district court for determination of whether the prosecutor acted with malice. The questions presented are: "(1) Did court of appeals err in holding that prosecutor under Michigan law did not enjoy absolute privilege for defamation arising out of exercise of official duties of his public office, but instead was clothed only with qualified privilege defeasible by showing common law malice? (2) Did court of appeals err in applying "actual malice" rule of New York Times Co. v. Sullivan, 376 US 254 (1964), only to media defendant and not to public prosecutor where plaintiff is conceeded 'public figure'?" Cahalan v. Walker, 542 F2d 681 (CA6).

In the appeal of Laredo Newspapers, Inc. v. Foster the high court ruled that the trial court properly held that an elected county surveyor was a public official within the meaning of New York Times Co. v. Sullivan, but remanded his case for determination of whether allegedly libelous statements contained in the newspaper article clearly related to the surveyor's official conduct. The court advised that a county surveyor who also worked as a consulting engineer and performed subdivision drainage studies is not a public figure for purposes of controversy involving the flooding of a subdivision, and that a private individual may recover damages from a publisher of defamatory falsehoods as compensation for actual injury upon showing that the publisher knew or should have known that the defamatory statement was false, 541 SW2d 809.

More important than whether the issue involves a matter of public interest is whether the individual involved will be considered a public figure. In answering this question the following cases may also be consulted: Exner v. American Medical Association, 12 Wash App 215, 529 P2d 863 (1974); Maheu v. Hughes Tool Co., 384 F Supp 166 (CD Cal 1974); Kapiloff v. Dunn., 275 Md 598, 343 A2d 251 (1975): Sandelin v. Pietch et al., 2 Med L Rptr 1600 (Ida 1977).

Publications which rely on "government information", or which may defame an individual by truthful statements of fact, or believing a trustworthy source have falsely defamed an individual are found as not liable.

Probably the classic case which sets the "malice standard" for civil libel action is that of New York Times Company v. Sullivan. Here the defendant published a full-page, ten-paragraph advertisement in its daily newspaper describing events which had taken place in Montgomery, Alabama, in connection with the Civil Rights movement. Some of the statements in the advertisement were not accurate. The plaintiff was the Montgomery Commissioner of Police. He brought an action against the defendant on the claim that some of the statements published referred to him in his official capacity as Police Commissioner. Prior to bringing suit the plaintiff sought a retraction from the defendant, but the request was denied. The denial

gave him the right as a public official to seek punitive damages. The trial judge instructed the jury that the statements under consideration were libelous per se and that the defendant was liable if they found that he had both published the statements and if the statements referred to the defendant. The jury was also instructed that if they found malice on the part of the defendant they might award punitive damages. The plaintiff was awarded $500,000. The award was upheld on appeal by the Supreme Court of Alabama in rejecting the defendant's contention that the verdict and award abridged the freedoms of speech and press that are guaranteed by the First and Fourteenth Amendments. 376 US 255 (1964).

On appeal the US Supreme Court reversed the judgment, holding that: (1) The Constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct. (2) A public official is prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement is made with actual malice-- that is, knowledge that it is false or with reckless disregard of whether it is false or not. (3) In this case the evidence did not support a finding of malice, ibid.

This is a leading and landmark case in modern constitutional law. It establishes a special constitutional rule for libel actions by public officials in their official capacity. The rule allows recovery only upon proof of actual malice. The only prior defense to such actions was that of truth. It is now truth or lack of malice. The rule is based on the First Amendment with special reference to the history of the Sedition Act and applicable to the states through the Fourteenth Amendment. It establishes the right to criticize official conduct, granting citizens a fair equivalent of the immunity granted to officials themselves. Three of the nine judges felt the rule ought to be one of absolute immunity, making recovery impossible under any conditions.

Retraction

As a retraction is the withdrawal of the accusation or charge, absent a statute

in the jurisdiction that establishes retraction as a defense to an action for defamation, the retractor would only have the effect of reducing the damages for which the author of the defamation would be liable. One reason for this principle is that although the retraction may be conveyed in precisely the same fashion as the original defamation, not everyone who learned of the defamation would learn of the retraction or believe it and therefore the retraction is not a complete defense. The retraction does undo some of the damage done to the victim of the defamation, and it does evidence a willingness on the part of the author of the defamation to undo part of the harm that was caused. For these reasons the victim, less injured, deserves less compensation and the defamer deserves less punishment. Consequently, compensatory and punitive damages are reduced.

In a number of states' statutes, ordinarily referring to newspapers and periodicals but sometimes including radio and television broadcasting stations, have been enacted to limit the victim of defamation when there has been a timely retraction to compensate for only those damages they can specifically prove. Some statutes allow punitive damages only where malice is shown.

"Bizarre stories are not limited to the Cambridge Food Coop. There was the time that Deleo, according to several sources, apparently 'punched out' Hill."

On July 7, 1976 The Real Paper printed the following correction:

> "In an article in last week's Real Paper on Cambridge health inspectors, Senior Code Enforcement inspector Bernard Hill was incorrectly described as also working at Libby's Liquor Market in Central Square. It was an unfortunate case of mistaken identity. There are two Bernard Hill's in Cambridge. The man who helps run the liquor store also serves as the captain of Cambridge's Auxiliary Police Force and has no connection with the city's health department. We apologize to both men for the confusion."

In summary, Prosser attached absolute immunity to judicial proceedings, legislative proceedings, executive communications, consent of the plaintiff, communications between husband and wife, and political broadcasts; and qualified privilege to interest of publisher, interest of others, common interest, communications to one who

may act in the public interest, fair comment on matters of public concern, and reports of public proceedings.

Finally, the truth is a defense against defamation. According to Prosser: "The defense that the defamatory statement is true has been given the technical name of justification...(T)he law presumes in the first instance that all defamation is false, and the defendant has the burden of pleading and proving its truth."

Action for Libel: Evidence and Separate Verdicts

At the trial for any civil action for libel, the defendant may attempt to prove that the plaintiff has already recovered damages, thus providing a retroactive effect for consideration by the jury in fixing the amount of the verdict, §76, Campbell v. New York Evening Post, 245 NY 320, 157 NE 153 (1927).

Actions by one plaintiff against several defendants may be consolidated, § 76, Goodrow v. New York Times Co., 241 App Div 190, 271 NYS 855, affd 266 NY 531, 195 NE (1934), but the measure of damages against each defendant shall be determined separately, §76, ibid. Nevertheless, a cause of action in slander may not be united with one in libel, Brown v. Reed, 10 Misc 2d 8, 167 NYS2d 41 (1957).

Defamation by Radio or Television

The newer defamation sections of the law, provide more specific protection for the licensed owners and operators of radio and television broadcasting stations against liability "for any legally qualified candidate for public office whose utterances under rules and regulations of the Federal Communications Commission may not be subject to censorship by such owner, licensee or operator... or their agents or employees," §75. According to the statute a legally qualified candidate "means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election; municipal, county, state or national; and one who meets the qualifications prescribed by the applicable laws hold the office for which he is a candidate...," § 75.

In order to be absolved from liability for damages for any utterance by a legally qualified candidate, the owner, licensee or employee of a broadcasting station, or a network of stations, shall announce, in substance, at the beginning and end of each political broadcast of more than five minutes in duration, and at the beginning of each such political broadcast of five minutes duration or less, that the remarks about to be made, or which have been made, by the speaker are not to be construed as reflecting the opinions or beliefs of the station, its ownership or management." §75.

Libel and Slander in the Electronic Media

While libel is generally considered written defamation and slander oral defamation of character, with a greater burden for showing damages in cases of slander than in cases of libel, it is not always easy to distinguish between libel and slander.

For example, in the case of Charles Parker Company v. Silver City Crystal Company a manufacturer brought action against a candidate for mayor and a radio broadcasting company for defamation because of a prepared statement read over radio by the candidate during an election campaign. He falsely stated that because of neglect and indifference of the incumbent mayor the manufacturer was 90 per cent out of production and was up for sale and that 1,000 jobs would disappear. The Supreme Court of Errors of Connecticut held that the law of libel rather than the law of slander was applicable, that the statement was not libelous per se and would not support an action for libel without proof of special damage, and that the statement was privileged in the absence of showing animosity or ill will, 142 Conn 605, 116 A2d 440 (1955).

Likewise in the case of Shor v. Billingsley, the court determined that a defamatory broadcast or telecast will be treated as libel, rather than as slander, even though no prepared script was used. Here the use of the plaintiff's name and picture for the defendant's alleged advantage was solely in connection with alleged defamatory statements made on a telecast. The plaintiff alleged that his name and

picture were used without his consent as a part of the program; that this was done for the purpose of increasing the value of the program to the sponsors and to the telecasters, of enhancing the reputation and commercial value of Billingsley as a performer, for the purpose of advertising "The Stork Club" and increasing its trade at the expense of the plaintiff, its competitor, 158 NYS2d 476 (1956).

The case of American Broadcasting--Paramount Theatres,Inc. v. EL Simpson involved an action against television companies for defamation in the dramatic presentation of an event in which a wellknown prisoner was transported by railway train. The courts of Georgia held that the presentation was actionable per se as defamacast, and that the plaintiff, who had been one of two guards who attended the prisoner inside the car, could maintain action in light of the presentation indicating that one of the two guards accepted a bribe, either by showing by extrinsic facts that he was the guard refereed to, or as a member of a two-man group, 106 Ga App 230, 126 SE2d 873 (1962).

Defamation and Appropriation Through Cable Television

The presentation of likeness by cable television raises many of the same problems which are present in broadcast communities (viz. radio and television); however, the technological control of cable television presents unique legal questions in three areas: (1) Defamation, (2) Copyright and related issues, and (3) Program Privacy.

Defamation of character takes two forms: slander and libel. Slander is the unjust and malicious injury to one's reputation using spoken words; libel is the unjust and malicious injury to one's reputation using written or printed words and pictures. In practice the legal distinction is at best vague. In reference to injuries committed via television and radio, the distinction is even more confounding. The distinction based upon a New York state court decision Shor v. Billingsley, et al. is that all defamatory broadcast statements, whether read from a script or spoken extemporaneously, be considered libel, supra. In other jurisdictions, remarks broad-

cast on the radio have been considered slander; whereas those on television have been considered libel. This distinction is based upon the definitions given above, and there is, however, no consensus on either of these decisions. However, recent legal opinion seems to indicate that the distinction between libel and slander should be based upon potential for harm and not the performance of form.

If the criteria of potential harm is invoked, then defamatory remarks on the local origination channel of a cable television system may be considered slander because of the relatively limited distribution of that signal over a geographic area. This is exclusive of the form taken.. The complicating factor is that in particular communities there are particular problems involved. If, for instance, a cable television system has 90% saturation, and defamatory remarks are made relative to a prominent citizen in a well-viewed locally originated television newscast, then the potential for harm is much greater and the defamation can be considered libel. In the case of political candidates, there are different rules applicable. The Federal Communications Commission regulations now seem to indicate that since a station cannot censor a political candidate when he or she is making a campaign speech, the station is relieved of responsibility for defamatory statements. The same holds true for cable television local origination.

Clearly however, laws relating to defamation via television and radio vary from state to state and from judicial jurisdiction to judicial jurisdiction. Until such time that there is a high level federal decision relative to this point, one should be advised to be familiar with applicable state regulations.

Copyright

Even before passage of the 1976 copyright law revision, the issue of copyright and cable television had been well established by judicial decision. Early threads of what became copyright related cases can be found in the Intermountain Broadcasting v. Idaho Microwave case where a district court rejected restrictions upon a cable television system carrying programs as unfair competition, 196 F Supp 315 (DC Id 1961);

and the Cable-Vision v. KUTV case in which a circuit court rejected the right of a broadcaster to restrict cable television carriage on the basis of an exclusive contract, 335 F2d 348 (CA9), cert den 379 US 989 (1965).

The judicial precedent for the Cable-Vision case came by analogy to patent cases heard by the US Supreme Court, namely the Sears-Roebuck and the Compco cases. The first case which dealt with copyright as a specific issue was the Fortnightly Corp. v. United Artists case, 392 US 390 (1968). Here it was decided that cable carriage of copyrighted broadcast programming was not an infringement of copyright. The legal reasoning is that distribution via a cable system is not considered a performance. It should be noted that this seems to have been a reversal in judicial thinking set forth in the Buck v. Jewel-LaSalle-Realty Co. decision, 283 US 202 (1931). In this case a hotel owner who piped radio music into each guest room in his hotel did constitute a performance. More recently the Teleprompter v. CBS case has clarified the question of cable television constituting a performance, 415 US 394 (1974). The Teleprompter v. CBS case made a distinction between off-the-air reception of television signals and importation of distant signals by microwave. The court decided that neither of these functions infringes upon copyright because the court argued, "neither method of signal distribution alters the function the cable system provides for its subscribers." The court decided that "the reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.

Conclusion

During the period from 1967-1974, private individuals involved in matters of public interest were often faced with the burden of proving the New York Times v. Sullivan malice standard in their libel suits, regardless of whether they may have been unwilling participants in public events, supra. In 1967 the reasoning of Justice Douglas was applied to invasion of privacy in the form of the Time, Inc. v. Hill decision, supra.

Having borrowed the malice standard from libel in order to apply it to privacy,

the court adopted the broadest possible interpretation of the new public principle and began applying it in cases of libel. The private individual who believed he had been defamed was now required to prove actual malice if the damaging news story concerned any matter of public interest, United Medical Laboratories, Inc.,v.Columbia Broadcasting System, Inc., 404 F2d 706 (CA9 1968), cert den 394 US 921 (1969); Davis v. National Broadcasting Co., 487 P2d 1304 (Ala 1971); Time, Inc. v. Johnston,448 F2d 378 (CA4 1971).

This trend was highlighted in the case of Rosenbloom v. Metromedia,Inc. when the high court approved extending the actual malice rule in libel whenever the statement was considered a matter of public interest. Here Justice Brennan joined the Chief Justice and Justice Blackmun in concluding that the New York Times standard of knowing or recklessfalsity applies in a state civil libel action brought by a private individual for a defamatory falsehood uttered in a radio news broadcast about the individual's involvement in an event of public or general interest. Justice Black concluded that the First Amendment protects the news media from libel judgments even when statements are made with knowledge that they are false. Justice White concluded that, in the absence of actual malice as defined in New York Times, the First Ammndment gives the news media a privilege to report and comment upon the official actions of public servants in full detail, without sparing from public view the reputation or privacy of an individual involved in or affected by any official action, 403 US 29 (1971).

In the case of Gertz v. Robert Welch,Inc, however, the high court rejected the requirement that private individuals libeled in stories that were matters of public interest must prove the stringent Times-Sullivan test of actual malice. Instead they need to establish only negligence on the part of the publisher or broadcaster. Nevertheless, these private individuals are required to show damages, a significant departure from the historic concept of the presumption of injury in questions of libel per se . The court concluded that private individuals are more vulnerable to injury, have less access to the media for rebuttal, and are more de-

serving of recovery because they had not voluntarily entered the public spotlight. With this reasoning and decision, the court ended its traditional requirement of strict liability, supra.

Justice Brennan, who had written the plurality opinion in Rosenbloom, joined Justice Douglas to dissent in the Gertz case. Again relying on Time,Inc. v. Hill, supra, Brennan addressed himself to the assumption that private people deserve special treatment because they do not assume the risk of defamation by freely entering the public arena. He reiterated the reasoning which had been developed in Time-Hill that "...voluntarily or not, we are all 'public' men to some degree," Gertz,supra.

Quickly discarding the possibility that Gertz might be a public figure, it became necessary for a long series of cases to determine the notion of how a public figure might be defined. One of the first cases to make such an attempt is that of Meeropol v. Nizer, which announced that the children of famous parents had achieved general fame or notoreity in the community. Here the court failed to acknowledge that the children of Julius and Ethel Rosenberg may have renounced the public spotlight by changing their name to Meeropol. Perhaps this was because they had reentered the spotlight in an effort to vindicate their parents alleged wrongful conviction and execution in 1953. Thus the Meeropols, as public figures, would have the burden of proving actual malice on the part of Attorney Louis Nizer in a libel action against his use of letters written by their parents in his book, The Implosion Conspiracy, Meeropol v. Nizer, 381 F Supp 29 (SDNY 1974).

Subsequent cases have ranged from those who have thrust themselves into the public eye to those who have been drawn into the public limelight, and from those who have achieved public recognition for purposes of a single or limited range of issues to those who have become universal public figures. Examples of thrusting oneself into the public eye include accepting the position of a highschool principalship, Kapiloff v. Dunn, 275 Md 598, 343 A2d 251 (1975), and serving as an accountant for the Finance Committee to Re-elect the President just prior to the Watergate episode, Buchanan v. Associated Press, 398 F Supp 1196 (DCDC 1975).

In a similar case a longstanding flouridation advocate was held to be a public figure for purposes of that issue by having assumed leadership and by having attempted to influence the outcome of the controversy, supra.

The case of Gertz opened the door for individuals to be drawn into a public controversy, thus becoming public figures with no intention or awareness that such would become the outcome. Here the court suggested that "...it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare," supra.

Based upon this interpretation, the court found that even a corporation could be drawn into a particular public controversy by virtue of being investigated by the Federal Trade Commission for potentially harmful activities on the part of the firm. The court held that by means of its own conduct and activities Trans World Accounts had become a public figure for the limited range of issues relating to the FTC complaint, Trans World Accounts, Inc. v. Associated Press et al., supra.

In the case of Wolston v. Reader's Digest Association, also discussed earlier, the court was not concerned whether the plaintiff had been "thrust" or "drawn" into the public eye since his failure to respond to the subpoena "invited attention and comment", supra.

Nevertheless, the act of defamation itself is not sufficient to draw the plaintiff into the public eye. For example, when a newspaper implied that Mrs. Mary Troman conducted her home as a gang headquarters, an untrue accusation, the court ruled that she was a private, not a public figure. Troman v. Wood, 340 NE2d 292 (1976).

It is well established that in defamation, once a person has become a public figure, he remains a public figure, Sidis. supra; Bandelin v. Pietsch et al., 2 Med L Rptr. 1600 (1977): Richard J. Ryder v. Time, Inc., 2 Med Rptr. 1221 (CADC 1976).

In the classic divorce case Mary Alice Firestone, a Palm Beach,Florida socialite, a TiMagazine article claimed that adultery was a part of the judge's findings, an untrue accusation. Adultery had been charged during litigation, but it had not been

ruled upon by the judge. The Florida Supreme Court claimed that since alimony was awarded, the reporter should have known that adultery was not part of the finding because Florida law denies alimony to those who are found to have committed adultery. The high court disagreed, however, ruling that this burden might be too much to expect of the average reporter. If Mrs. Firestone had been ruled a "public figure" by this court, she would have been required to demonstrate actual malice under Times - Sullivan and Gertz in order to collect damages. But since the Supreme Court decided that she was a "private person", despite the fact that she had invited attention and comment in her press conferences, which she had called, she was required to demonstrate only negligence plus damages in order to win a judgment, Time, Inc. v. Firestone, supra.

The often difficult decision as to whether libel plaintiffs are public or private individuals is a critical one which has been considered by the courts in a variety of cases. Several such instances worthy of investigation are as follows: Washington Post Co. v. Keogh,365 F2d 965 (1964); Thomas H. Maloney and Sons, Inc. v. EW Scripps Co., 334 NE2d 494 (Ohio 1974); Chapadeau v. Utica Observer-Dispatch, Inc., 38 NY2d 196, 341 NE2d 569 (1975); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321NE2d 580 (1975); Walker v. Colorado Springs Sun Inc., 538 P2d 450 (1975); Troman v. Wood , 340 NE2d 292 (Ill 1975); Gobin v. Globe Pub. Co. 531 P2d 76 (Kans 1975); Rosanova v. Playboy Enterprises, Inc., 411 F Supp 440 (SD Ga 1976); Walters v. Sanford Herald, Inc.,228 SE2d 766 (NC 1976); Jacron Sales Co.,Inc. v. Sindorf, 350 A2d 688 (Md 1976); Taskett v. King Broadcasting Co., 546 P2d 81 (Wash 1976); Martin Marieta Corp. v. Evening Star Newspaper Co., 417 F Supp 947 (1976); Afco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 NE2d 580 (Ind 1975), cert den 424 US 913 (1976); Faegler v. Phoenix Newspaper In c.,560 P2d 1216 (Ariz 1977).

It is clear that the states, which have a strong interest in protecting the reputations of their citizens, may set negligence or any other standard they wish, so long as they do not impose liability without fault. By the beginning of 1977,

it had been demonstrated in the cases indicated above that nine states had adopted the standard of negligence for private individual libel plaintiffs to plead and prove against their alleged defamers. Onestate had adopted the more difficult to prove "gross irresponsibility" standard, and two others adopted the New York Times actual malice fault standard. Here the private person as well as the public official or public figure would be required to prove knowing or reckless falsehood by the publisher. Furthermore, it has been ruled in the District of Columbia that when a corporation, as distinct from a "natural person", brings a libel suit, it shall be subject to the same rigid actual malice standard.

Thus it is well recognized that one who publishes a false and defamatory communication concerning a private individual is subject to liability if, and only if, the defaming person, institution or organization is aware that the statement is false and that it defmaes the other, acts in reckless disregard of these matters, or acts negligently in failing to ascertain them. The latter least restrictive standard is the failure to use the amount of care which a reasonably prudent individual would use under these circumstances. It is for the jury to decide whether the defendent acted reasonably in attempting to discover the truth or falsity of the defamatory character of the publication. The judge must decide whether the statement is capable of a defamatory meaning or interpretation, and the jury must decide whether such an interpretation has been made by at least one third party.

FOOTNOTES

The Consolidated Laws of New York Annotated (NY: Edward Thompson Company, 1948), p.67

William L. Prosser, "More Libel Per Quod," 79 Harv LR 1629, 1630-1631 (1966). His views on both policy and law are disputed in Eldridge, "The Spurious Rule of Libel Per Quod," 79 Harv LR 733 (1966).

Credit for this section should go to Professor Martin LoMonaco of Boston College. For further reading see Walter B. Emery, Broadcasting and Government: Responsibilities and Regulation (East Lansing: Michigan State University Press, 1961); Don R. LeDuc, Cable Television and the FCC: A Crisis in Media COntrol (philedelphia: Temple University Press,1973).

See 37 BU LR 378 (1957); 32 Tul LR 136 (Dec 1957); 71 Harv LR 384 (Dec 1957); 31 St, John's LR 314 (May 1957).

Harry Kalven, Jr. "Privacy in Tort Law—Were Warren and Brandeis Wrong?" 31 Law and Contemporary Problems 326 (1966). The concept of merging privacy and defamtion in one tort is developed further in Wade, "Defamation and the Right of Privacy," 15 Vand LR 1093 (1962).